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Probate and Trusts

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PROBATE AND TRUSTS

*Lynne McNeil Candler**

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THIS Article reviews case law developments in the areas of wills, nontestamentary transfers, intestate succession, estate administration, guardianships, and trusts. The Survey period covers decisions published between October 1, 1995, and September 30, 1996.

I. WILLS

A. WILL CONTESTS

In *Richardson v. Laney*¹ the court found that sufficient evidence existed to support the jury's determination that a co-executor named in the decedent's will had a conflict of interest with the estate.² The decedent executed a will several years prior to his death, in which he named one of his sons and his daughter as co-executors. After the decedent became ill he transferred some of his property to this son and daughter. Following the decedent's death the decedent's other son and a grandson, who were two of the other beneficiaries of his will, attempted to probate a copy of

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1. 911 S.W.2d 489 (Tex. App.—Texarkana 1995, no writ). For a discussion of other issues in this case see *infra* notes 157-61 and accompanying text.

2. *Id.* at 492.

the will, alleging that the original was lost. They also asked to be named independent co-executors of the will instead of the son and daughter named because of a conflict of interest. The son named as co-executor then offered the original will for probate and filed an opposition to the other application. At trial the jury found that the son named as co-executor in the will had a conflict of interest with the estate. The jury based its finding upon evidence that the son withdrew estate funds and deposited them into his personal account, used estate funds to pay his personal bills, used a truck belonging to the estate without paying for the use, removed personal property from the decedent's home, and, although he alleged that the decedent had given him the home, paid utility bills for the home from estate funds. The son claimed that he kept records concerning these matters, but he did not offer the records into evidence. The son contended on appeal that the other beneficiaries had the burden of proving that he did not keep records. The appeals court disagreed, stating that the other beneficiaries merely had the burden of proving that the son did not reimburse the estate, and that they met their burden of proof.³

In *Tieken v. Midwestern State University*⁴ the court determined that the testator lacked testamentary capacity⁵ and that the testator executed the will as the result of undue influence.⁶ The appellant became friendly with the testator and her husband several years before their deaths. The testator and her husband executed wills, in which they benefited Midwestern State University on the death of the second of them to die, approximately four years after the appellant met them. The testator and her husband later executed codicils in which they named another friend to serve as independent executor of their wills, and they later gave the other friend their powers of attorney. The testator's husband died in 1986. The testator had been in poor health prior to her husband's death, and her health continued to decline. The appellant moved the testator to a nursing home, and the testator soon thereafter revoked the power of attorney and granted a new power of attorney to the appellant. Several months later the testator executed a new will, in which she left a significant part of her estate to the appellant, as well as making gifts to two charities not named in her earlier will. Following the testator's death, the attorney who drafted the new will offered it for probate and the friend named as independent executor in the earlier will contested the new will. The jury found that the testator lacked testamentary capacity when she executed the new will after considering evidence that the testator took medication that caused hallucinations, the testator was disoriented and had memory problems, the testator had medical problems that affected her memory, and the testator had a short attention span. The appeals court found that the jury had some evidence to support its finding of lack of testamentary

3. *Id.*

4. 912 S.W.2d 878 (Tex. App.—Fort Worth 1995, no writ).

5. *Id.* at 884.

6. *Id.* at 886.

capacity⁷ and that the jury's finding was not against the preponderance of the evidence.⁸ The appeals court further found that evidence existed to support the jury's finding that the appellant and another person exerted undue influence over the testator.⁹ The appeals court also held that the appellant's contention that Midwestern State University was a contestant in the will contest because it contributed to the original contestant's legal fees was moot.¹⁰

In *Orozco v. Orozco*¹¹ the court held that the testator's mark on the will met the requirements of Probate Code section 59¹² for a validly executed will.¹³ The court also held that sufficient evidence existed to support the jury's finding that the testator actually placed her mark on the will.¹⁴ The testator suffered from severe rheumatoid arthritis, which, among other things, prevented her from signing her name. While in the hospital and shortly before surgery, the testator met with her attorney concerning her new will. The attorney prepared the will and the testator executed the will by placing her mark in the presence of two witnesses, the notary public, and her attorney. All of those present at the time the testator made her mark testified that she held the pen and placed the mark herself. The testator died almost one year after she made her will. The appellant contended that the testator failed to execute the will with the requisite formalities under Probate Code section 59¹⁵ since the testator merely made her mark without signing or printing her name. The appellant requested an instructed verdict that the testator did not execute the will with the requisite formalities, which the trial court denied. The appeals court held that the trial court did not err in denying the motion for instructed verdict since the testator's mark met the requisite formalities for execution.¹⁶ The appeals court found that sufficient evidence existed to support the jury's finding that the testator made the mark

7. *Id.* at 884. The appeals court found that the trial court committed no error by overruling the appellant's motion for JNOV. *Id.*

8. *Id.* The court thus found that the trial court committed no error by overruling appellant's motion for new trial. *Id.* at 884-85.

9. *Id.* at 886. The court noted that the jury considered evidence that the testator lost contact with most of her friends after she moved into the nursing home, the testator suffered from depression following her husband's death and the decline in her own health, and the testator became dependent on the appellant and one other person for assistance with her financial affairs. *Id.*

10. *Id.* at 887. The appellant contended that the university contested the 1987 will by paying a contingent fee to the attorney representing the will contestant. The court found moot the appellant's contention because the trial court found the later will, which contained a no contest clause, invalid, so that whether the university actually contested the will did not matter. *Id.*

11. 917 S.W.2d 70 (Tex. App.—San Antonio 1996, writ denied).

12. TEX. PROB. CODE ANN. § 59 (Vernon Supp. 1996).

13. *Orozco*, 917 S.W.2d at 73.

14. *Id.* at 74.

15. TEX. PROB. CODE ANN. § 59 (Vernon Supp. 1996). Section 59 requires that a will either be wholly in the testator's handwriting, or be signed by the testator in the presence of two or more subscribing witnesses. *Id.*

16. *Orozco*, 917 S.W.2d at 73.

herself.¹⁷ The court further found that the jury's finding that a person whom the testator identified in her will as her son was not her son was not inconsistent with the jury's finding that the testator had testamentary capacity.¹⁸

In *Estate of Davis*¹⁹ the court examined the evidence considered by the jury and found that no legally or factually sufficient evidence supported the jury's finding that the testator executed her will as the result of undue influence.²⁰ Prior to her husband's death, the testator and her husband executed wills in which they equally benefitted their six children on the death of the survivor. During her husband's last illness, conflicts developed between the testator and two of her sons concerning her husband's medical treatment, and the conflicts continued following his death concerning funeral and burial decisions. The two sons had no contact with the testator after the funeral. Several months after her husband died, the testator executed a new will, in which she changed the executor from one of the sons with whom she had a conflict, gave each of the two sons with which she had a conflict a small gift, and left the remainder of her estate equally to her other four children. At the time the testator executed her new will she lived with two of her daughters, who had several conversations with the testator about the conduct of the two sons. Following the testator's death, the two sons contested the probate of the second will and the jury found that the testator executed the new will as the result of undue influence. The other four children requested a new trial, which the trial court denied, on the basis that no evidence existed to support the jury's finding. The trial court denied the motion for new trial and the four children appealed. The appeals court considered the three elements of undue influence set forth in *Rothermel v. Duncan*²¹ and found that no

17. *Id.* at 74. The court noted that everyone present at the execution of the will testified that the testator made her mark. The testimony of those present when the testator signed her will, the court reasoned, could rationally carry more weight than the testator's doctor, who was not present, and a nurse who reviewed the medical file, who was also not present. *Id.*

18. *Id.* at 75. The testator apparently identified a man as her son to several witnesses, as well as identifying him as her son in her will. The jury, however, found that the man was not her son, although some facts supported the testator's belief. The jury also found that the testator did not lack testamentary capacity because of her identification of the man as her son. The appellant did not request a jury instruction on insane delusion, but later requested the trial court to consider the jury's response as if they had received an instruction on insane delusion. The appeals court noted that the jury considered the issue of whether the man was the testator's son and the court could not decide that the jury failed to consider the testator's belief in their finding that the testator had testamentary capacity. *Id.* The court thus held that the jury's answer that the man was not the testator's son was not inconsistent with its other answers. *Id.*

19. 920 S.W.2d 463 (Tex. App.—Amarillo 1996, writ denied).

20. *Id.* at 467.

21. 369 S.W.2d 917, 922 (Tex. 1963). The three elements, which the contestant must prove, are as follows:

1. the existence and exertion of an influence;
2. the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and
3. the execution of a testament which the maker thereof would not have executed but for such influence.

evidence existed that the children who lived with the testator exerted undue influence in connection with the new will,²² that no evidence existed that the testator executed the will not as the result of her own free will, but as the result of an overpowering influence,²³ and that no evidence existed that the testator would not have executed the will except for the alleged influence.²⁴

In *Evans v. May*²⁵ the court determined that the decedent did not revoke a will that he had taped together and on which he had written a note indicating that he had not torn the will and that the will was still in effect.²⁶ The court also found that no undue influence existed as a matter of law based on the testator's relationship with his "lifemate."²⁷ The testator executed his will, in which he named his long-time companion as executor and sole beneficiary, with all requisite formalities of law. A few days after the testator executed the will he and his companion argued, and the companion tore up the will. The testator taped the will back together and noted on each page that he had not torn the will and that the will was still in effect. The testator also signed the note on each page. Following the testator's death, his sister contested the probate of the will on the bases that the testator had revoked the will because it was torn and undue influence. The trial court admitted the will to probate, and the sister appealed. The appeals court found that not only was the will not in a state of mutilation because it had been taped back together, but also that the testator's handwritten note supported the trial court's determination that the testator had not revoked the will.²⁸ The sister also contended that the fact that the testator had lived with his companion for over thirty years and the nature of their relationship established undue influence. The sister provided no other evidence of undue influence, nor did she object to the testimony of the attorney who drafted the will, who stated that the testator did not act under undue influence when he executed the will. The appeals court held that because the sister did not object to the testimony, and because she failed to establish any of the elements of undue influence, no undue influence existed.²⁹

B. WILL CONSTRUCTION

In *Estate of Hunt*³⁰ the court determined that the testator died intestate in so far as the remainder interest in a testamentary trust, so that the remainder of the trust would pass to the testator's heirs at the death of

Id. at 922.

22. *Davis*, 920 S.W.2d at 466.

23. *Id.* at 467.

24. *Id.* The court reversed the cause for a new trial because the appellants did not lay the predicate for rendition of judgment. *Id.* at 467-68.

25. 923 S.W.2d 712 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

26. *Id.* at 714.

27. *Id.* at 715.

28. *Id.* at 714.

29. *Id.* at 715.

30. 908 S.W.2d 483 (Tex. App.—San Antonio 1995, writ denied).

the lifetime beneficiary.³¹ The testator established a testamentary trust for the benefit of a niece for the niece's lifetime. The testator provided for a contingent beneficiary if the niece failed to survive the testator, but the testator made no provision for distribution of the trust following the niece's death if the niece survived the testator. The trustee filed a declaratory judgment action, requesting the court to determine the disposition of the remainder of the trust estate upon the death of the niece. The testator's statutory heirs, other than the niece, who took no part in the action, filed a motion for summary judgment on the basis that the testator died intestate as to the remainder interest in the trust. The contingent beneficiary, which was a charity, also filed a motion for summary judgment on the basis that it should receive the remainder interest. The trial court granted the charity's motion for summary judgment. The appeals court found that the will was not ambiguous, therefore, the trial court should not have applied any rules of will construction.³² The court found that since the testator made no provision for disposition of the remainder interest within the will, the remainder interest passed by intestacy.³³ The court also found that the trial court should have determined the testator's heirs, and, since an ad litem represented the interests of the unknown and unascertained heirs and the heirs filed affidavits establishing their kinship with the testator, the heirs met the burden of proving their heirship as a matter of law.³⁴ The appeals court reversed the trial court and rendered judgment declaring the heirship of the six heirs and the amount of the remainder interest each would receive upon the death of the testator's niece.³⁵

In *In re Estate of Brown*³⁶ the court considered whether ademption resulted when, at the time of his death, the testator did not own certain property he devised and bequeathed in his will.³⁷ The testator specified in his will that he left his residence located at a specific address to his wife. The testator also left his wife the proceeds of a life insurance policy for the purpose of purchasing his interest in his professional association and in the partnership owning the medical clinic building in which his practice was located. After he made the will the testator and his wife moved to a new residence. The testator attempted to make another will prior to his death, but the trial court found that the testator did not execute the later will with the requisite formalities and denied the probate. The testator's brother then offered the earlier will for probate, the trial court admitted the earlier will to probate, and then the brother, as executor, filed a petition for construction of the will. The testator's two daughters from an earlier marriage claimed that ademption prevented the gifts

31. *Id.* at 486.

32. *Id.* at 485.

33. *Id.*

34. *Id.* at 486.

35. *Id.*

36. 922 S.W.2d 605 (Tex. App.—Texarkana 1996, no writ).

37. *Id.* at 606-09.

of both the residence and the insurance policy since the testator did not own the residence listed in his will at the time of his death and no one could locate any record showing the ownership of the insurance policy listed. The trial court first found that the professional association owned key-man insurance to fund the purchase of a decedent shareholder's interest in the association and in the medical clinic partnership at all times between the date the testator executed the earlier will and the date of the testator's death. The trial court then concluded that the testator intended for his wife to receive his interest in the residence in which they lived at the time of his death, as well as the proceeds from the sale of his professional association stock and partnership interest in the medical clinic property. The appeals court noted first that ademption will apply only to a specific devise or bequest.³⁸ The appeals court found that although the trial court did not classify the devise of the residence as a specific devise, the trial court did find that the devise would have failed if the testator had not owned a residence at the time of his death.³⁹ The appeals court found that the devise of the residence was specific and that it failed because the testator did not own the listed residence at the time of his death.⁴⁰ The appeals court next considered the gift of the insurance policy and determined that the gift was ambiguous, so that the trial court properly considered extrinsic evidence to determine the testator's intent.⁴¹ The court reversed the trial court's decision concerning the residence and affirmed the trial court's decision concerning the gift of the insurance policy.⁴²

C. PRIVACY

In *Barcelo v. Elliott*⁴³ the court held that an attorney owes no duty of care to intended beneficiaries of a will or trust when the testator or settlor retained the attorney.⁴⁴ The decedent engaged the services of an estate planning attorney in 1990. The decedent executed an *inter vivos* trust, in which she appointed a bank as trustee, and a new will, which left the residue of her estate to the *inter vivos* trust upon her death. The decedent was the sole beneficiary of the trust during her lifetime, with the remainder passing to her children, siblings, and grandchildren. The trust agreement specifically stated that it would be effective only when executed by

38. *Id.* at 607, (citing *Welch v. Straach*, 518 S.W.2d 862, 867 (Tex. Civ. App.—Waco), *rev'd on other grounds*, 531 S.W.2d 319 (Tex. 1975)).

39. *Id.* at 607-08. The appeals court reasoned that the trial court implicitly found that the devise of the residence was specific. *Id.*

40. *Id.* at 608.

41. *Id.* at 608-09. The court determined that the gift of the insurance policy created a latent ambiguity, which the trial court could only resolve through consideration of extrinsic evidence. *Id.* at 609.

42. *Id.* at 609. The dissent disagreed with the majority concerning the ademption of the residence and would have held that the wife should receive the gift of the residence in which they resided at the time of the testator's death. *Id.* at 609-10 (Cornelius, C.J., dissenting).

43. 923 S.W.2d 575 (Tex. 1996).

44. *Id.* at 579.

the bank. The bank failed to execute the trust agreement during the decedent's lifetime. Following the decedent's death, two of her children contended that the trust was invalid. The probate court agreed with the two children and found that the decedent's estate passed by intestacy. The grandchildren settled with the estate for less than they contended that they would have received had the trust been valid. The grandchildren then sued the drafting attorney for malpractice, alleging that the attorney negligently drafted the trust and the will, negligently failed to ensure the full execution of the trust, and negligently failed to ensure funding of the trust. The attorney filed a motion for summary judgment, alleging that he owed no duty to the grandchildren as intended beneficiaries of the trust. The trial court granted the attorney's motion for summary judgment and the appeals court affirmed.⁴⁵ The supreme court also affirmed.⁴⁶ The supreme court held that the intended beneficiaries could not recover under a third-party beneficiary theory.⁴⁷ Two dissenting justices would have held that an intended beneficiary of a will or testamentary trust who lost a legacy due to negligence on the part of the drafting attorney could bring a cause of action against a drafting attorney.⁴⁸ A third dissenting justice, in a separate dissent, would have limited any cause of action by intended beneficiaries to only those specifically identified in the invalid instrument.⁴⁹

II. NONTESTAMENTARY TRANSFERS

In *Cummings v. Cummings*⁵⁰ the court found that the trial court improperly granted a motion for summary judgment when a fact issue existed concerning whether a bank account was an individual account or an account payable to a third party on the death of the owner.⁵¹ The dece-

45. *Barcelo v. Elliot*, 927 S.W.2d 28, 31 (Tex. App.—Houston [1st Dist.] 1995), *aff'd*, 923 S.W.2d 575 (Tex. 1996).

46. *Barcelo*, 923 S.W.2d at 579. The majority noted the conflicts that could arise between disappointed intended beneficiaries and the drafting attorney. *Id.* at 578. The court stated as follows:

[W]e are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations. We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.

Id. at 578-79.

The supreme court denied writ in another case involving the same issues. *Oliver v. West*, 908 S.W.2d 629 (Tex. App.—Eastland 1995, writ denied). In *Oliver v. West*, the appeals court held that the drafting attorney owed no duty to intended beneficiaries who were not the attorney's clients. *Id.* at 631. The appeals court also held that the intended beneficiaries could not allege a cause of action under a third-party beneficiary theory. *Id.*

47. *Barcelo*, 923 S.W.2d at 579.

48. *Id.* at 579-81 (Cornyn, J., joined by Abbott, J., dissenting).

49. *Id.* at 581-82 (Spector, J., dissenting).

50. 923 S.W.2d 132 (Tex. App.—San Antonio 1996, writ denied).

51. *Id.* at 134-35.

dent opened a bank account in 1986. The signature card contained an "X" in the block indicating an individual account. Another block, which would have indicated that the account was a "POD" account, contained no "X." The name of one of the decedent's children, however, appeared in a box indicating a beneficiary designation for a trust or "POD" account. The trial court granted a summary judgment, finding that the decedent created an individual account, which was part of his probate estate, rather than a "POD" account. The child listed as the beneficiary on the signature card appealed. The appeals court found that the signature card was ambiguous and that the decedent's intent in establishing the type of account created a factual issue precluding summary judgment.⁵²

In *Cweren v. Danziger*⁵³ the court held that the trial court incorrectly granted summary judgment on the issue that certain joint accounts did not have survivorship rights or were trust accounts when the movant only offered evidence that the banks did not have signature cards or other documents on file that indicated the decedent's intent in creating the accounts.⁵⁴ The decedent created twenty bank accounts at three different banks, in which she styled the account in her name and in the name of one or more family members. Following the decedent's death, the administrator of her estate sought to include the accounts in the decedent's probate estate and filed a declaratory judgment action concerning the accounts. The administrator alleged that none of the banks had any documents on file indicating the decedent's intention to create either joint tenancy accounts with rights of survivorship or trust accounts. The administrator offered no other evidence, but relied upon *Stauffer v. Henderson*⁵⁵ and section 439 of the Probate Code⁵⁶ in his contention that the styles of the accounts did not establish any survivorship rights. The appeals court found section 439⁵⁷ does not require the use of written agreements to create joint accounts with rights of survivorship and that Probate Code section 436(14)⁵⁸ does not require that a trust designation on an account be on file with the bank that holds the account.⁵⁹ The court reversed the summary judgment and remanded the case.⁶⁰

In *Emmens v. Johnson*⁶¹ the court held that the decedent's divorce precluded his ex-spouse from receiving the benefits under his profit-sharing

52. *Id.* at 134.

53. 923 S.W.2d 641 (Tex. App.—Houston [1st Dist.] 1995, no writ).

54. *Id.* at 644-45.

55. 801 S.W.2d 858, 865 (Tex. 1990).

56. TEX. PROB. CODE ANN. § 439 (Vernon Supp. 1996) provides the methods of creating a joint account with rights of survivorship and a trust account.

57. *Id.*

58. TEX. PROB. CODE ANN. § 436(14) (Vernon Supp. 1996).

59. *Cweren*, 923 S.W.2d at 644. The court found that the administrator did not offer any evidence that no one else held the written agreements creating the type of accounts or that he had made any inquiries or personal search concerning the location of any written agreements. *Id.* The court found that the administrator thus did not meet his burden of proof to establish that he was entitled to summary judgment. *Id.* at 644-45.

60. *Id.* at 645.

61. 923 S.W.2d 705 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

plan.⁶² Following his divorce, the decedent failed to change the beneficiary designation on his profit-sharing plan from his ex-wife. The value of the decedent's plan grew significantly between the time of his divorce and the date of his death. The administrator of the decedent's estate notified the decedent's employer that section 3.633 of the Family Code⁶³ provided that the divorce terminated the beneficiary designation in favor of the ex-wife and that the administrator should receive the decedent's plan benefits. The employer received the administrator's notice prior to paying benefits. The administrator later sued the employer to collect the benefits. The trial court originally found that the employer should pay the benefits to the administrator, but, on rehearing, found that the ex-wife was the beneficiary. The administrator appealed, alleging that the ex-wife could not remain the beneficiary unless the decedent redesignated her as beneficiary following the divorce. The appeals court held that Family Code section 3.633,⁶⁴ which provides that the ex-wife's designation as beneficiary terminated upon divorce, is the federal common law that controls the matter and reversed the trial court's judgment.⁶⁵

III. INTESTATE SUCCESSION

In *Lacy v. Lacy*⁶⁶ the court affirmed a judgment denying heirship.⁶⁷ The decedent died intestate in 1949, but no one undertook an action for determination of heirship until 1988. Two of the applicants for the determination of heirship contended that they were born prior to the decedent's first marriage, while the decedent lived with their mother as husband and wife. Testimony given at trial by numerous witnesses, however, provided evidence that the two applicants were the biological children of another person with the same last name. The court entered a judgment denying the heirship of the two applicants in 1993. The court specifically found that the two applicants were not the decedent's children and concluded that the two applicants failed to meet their burden of proof by clear and convincing evidence that they were the decedent's children. In 1994, after the appeals court had originally denied the appeal of the judgment denying heirship on the basis that no final judgment of heirship existed,⁶⁸ the trial court entered a judgment declaring heirship, in which the court found that the only children born to the decedent were born during his first marriage. The two applicants did not request the court to make any additional findings of fact or conclusions of law concerning the heirship, and the court did not do so. The two persons who alleged that they were the decedent's biological children appealed. The appeals court found that sufficient evidence existed to support the judg-

62. *Id.* at 712.

63. TEX. FAM. CODE ANN. § 3.633 (Vernon Supp. 1996).

64. *Id.*

65. *Emmens*, 923 S.W.2d at 712.

66. 922 S.W.2d 195 (Tex. App.—Tyler 1995, writ denied).

67. *Id.* at 198.

68. *Id.* at 197.

ment denying heirship.⁶⁹

IV. ESTATE ADMINISTRATION

In *Dickey v. Dickey*⁷⁰ the court held that the probate court had jurisdiction over an ex-wife's claim against her ex-husband's estate for the amount of life insurance proceeds the divorce court ordered the ex-husband to maintain.⁷¹ The decedent and his ex-wife divorced in 1967. Pursuant to the terms of the divorce decree the decedent was to maintain two life insurance policies on his life, which named his ex-wife as primary beneficiary and his children as contingent beneficiaries. The decedent also had the duty to inform his ex-wife if he allowed the policies to lapse. The decedent allowed one policy to lapse in 1972 and the other in 1973. Following the decedent's death his ex-wife filed suit in probate court for damages in the amount of the lapsed policies. The ex-wife filed a motion for partial summary judgment accompanied by her affidavit stating that her ex-husband never informed her that the policies had lapsed. The ex-husband's executor alleged that laches and the statute of limitations barred the ex-wife's claim. The probate court entered partial summary judgment for the ex-wife. The executor appealed, alleging that the probate court should have considered her defense of either the four year statute of limitations, the ten year statute of limitations, or laches. The executor also contended that the probate court did not have jurisdiction over a non-probate asset. The appeals court found that the discovery rule⁷² applied to the case, that a fact issue existed concerning when the ex-wife learned of the lapse of the policies, and that the probate court improperly granted summary judgment because of the fact issue.⁷³ The court then found that the executor did not present any evidence in support of her defense of laches.⁷⁴ Finally, the court found that the probate court had jurisdiction to hear the ex-wife's claim against the estate.⁷⁵

69. *Id.* at 198. The court held that the trial court properly excluded two documents as hearsay because the appellants offered the documents to establish the truth of the matter asserted. *Id.* The appeals court also affirmed the trial court's decision to dismiss the appellants' claim for title and possession of real property because the trial court lacked jurisdiction. *Id.* at 199. The appeals court found that the trial court, which was a statutory county court, only had jurisdiction to hear the determination of heirship, but did not have jurisdiction to hear the disputed real property matters since no estate administration was pending. *Id.* Finally, the appeals court held, after reviewing the judgment declaring heirship, that the judgment met the requirements of TEX. PROB. CODE ANN. § 54 (Vernon 1980). *Lacy*, 922 S.W.2d at 200.

70. 908 S.W.2d 311 (Tex. App.—San Antonio 1995, no writ).

71. *Id.* at 314.

72. See *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). The discovery rule "operates to toll the running of the period of limitations until the time that the plaintiff discovers, or through the exercise of reasonable care and diligence should discover, the nature of his injury." *Id.*

73. *Dickey*, 908 S.W. at 313. The court also found that the executor did not prove all elements of the affirmative defense of limitations, so the trial court could not dismiss the action on that basis.

74. *Id.*

75. *Id.* at 314.

In *National Union Fire Insurance Co. v. Olson*⁷⁶ the court held that the testator's homestead was exempt from the claims of his creditors because his minor child survived him.⁷⁷ The decedent was survived by an adult son, who was named executor of his estate, and a minor daughter. The decedent's will provided for distribution of his estate, including the homestead, to his son. The daughter lived with her mother elsewhere, but the decedent contributed to her support during his lifetime. The estate was insolvent, and its largest creditor filed a claim in which it sought a judgment lien against all of the decedent's non-exempt real property. The creditor claimed that the homestead was not exempt, but the executor claimed that the homestead was exempt because of the existence of the minor child. The probate court agreed with the executor, granted summary judgment in his favor, and awarded him attorney's fees. The creditor appealed, asserting that the homestead lost its exempt status when neither the minor child nor her guardian asserted any right to occupy the property and that the trial court erred by awarding the executor attorney's fees. The appeals court found that the minor child's right to occupy the homestead property is distinct from the beneficiary's right to receive the property clear of the decedent's debts,⁷⁸ and that the homestead remained exempt because of the existence of the minor child.⁷⁹ The court also found that the probate court did not abuse its discretion in awarding attorney's fees to the executor because only this creditor attempted to exert a claim against the homestead property.⁸⁰

In *Shepherd v. Ledford*⁸¹ the court held that the decedent's surviving spouse, his only heir, could assert claims for personal injury on behalf of his estate without an administration of the estate.⁸² The decedent died following surgery for replacement of an aortic valve. The decedent's sole survivor was his common-law wife. The wife made arrangements for payment of the decedent's debts, thus making an administration of his estate unnecessary. The decedent owned no real property and little personal property, all of which was community property and all of which passed to his wife at his death. The decedent's wife filed suit against the doctors as the surviving spouse and as the decedent's heir. The trial court awarded the wife damages as the surviving spouse, but disregarded the jury's verdict awarding damages for the decedent's personal suffering, on the basis that no personal representative of the estate brought the action. The ap-

76. 920 S.W.2d 458 (Tex. App.—Austin 1996, no writ).

77. *Id.* at 462.

78. *Id.* at 461. The court noted that the existence of a surviving minor child is sufficient for determining exempt status of the homestead. *Id.* (citing TEX. CONST. art XVI, § 52; TEX. PROB. CODE ANN. § 279 (Vernon 1980); *Milner v. McDaniel*, 120 Tex. 160, 164, 36 S.W.2d 992, 993 (1931); *Childers v. Henderson*, 76 Tex. 664, 665, 13 S.W. 481, 482-83 (1890)).

79. *Olson*, 920 S.W.2d at 462. The court found that the facts upon the death of the decedent determine the exempt nature of the property and that later events have no effect. *Id.* Thus, once the homestead was exempt, it remained exempt. *Id.*

80. *Id.* at 463.

81. 926 S.W.2d 405 (Tex. App.—Fort Worth 1996, writ granted).

82. *Id.* at 414.

peals court found that the surviving wife was a "legal representative" of the decedent and that no administration of the estate was necessary in order for a surviving spouse to plead personal injury claims on behalf of the estate.⁸³

V. GUARDIANSHIPS

A. GUARDIANS

In *Texas Department of Mental Health and Mental Retardation v. Ellison*⁸⁴ the court held that the trial court reasonably determined that the guardian had performed his duties and thus did not abuse its discretion when it did not remove the guardian.⁸⁵ The ward was a long-time resident of a state school. The guardian, appointed in 1978, oversaw the ward's rural real estate. Under court approval, the guardian had leased the real property for many years and had included the rental income in the annual accounts furnished to the court. The Texas Department of Mental Health and Mental Retardation (TDMHMR) obtained two agreed judgments for the amount of the ward's care. After TDMHMR obtained the first agreed judgment, it requested that the trial court order the sale of the ward's real estate to satisfy the judgment, which the court ordered in 1987. The guardian did not sell the property after that date. Approximately one year after the second agreed judgment TDMHMR applied for the removal of the guardian because the guardian had not sold the property. The court determined not to remove the guardian. The guardian later filed a motion requesting the court to set aside 200 acres of the property as the ward's homestead. TDMHMR responded by again filing an application for removal of the guardian. The trial court granted the guardian's motion for recognition of the homestead, but limited the homestead to 100 acres, and denied TDMHMR's application for removal of the guardian. The trial court also allowed the guardian attorney's fees from the guardianship estate. TDMHMR appealed, alleging that the guardian breached his duty to the ward by failing to act on TDMHMR's claims in a timely manner, by failing to sell the property, by mismanaging the estate, and by other acts. The appeals court found that the trial court properly exercised its discretion not to remove the guardian under Probate Code section 797,⁸⁶ Probate Code section 761(c)(3),⁸⁷

83. *Id.*

84. 914 S.W.2d 679 (Tex. App.—Austin 1996, no writ).

85. *Id.* at 683.

86. TEX. PROB. CODE ANN. § 797 (Vernon Supp. 1996) provides that a court may remove a guardian for failure to act on a claim if the claimant later successfully brings suit to establish the claim. The language is permissive, rather than mandatory, thus allowing the trial court discretion in making its determination.

87. *Id.* § 761(c)(3) (Vernon Supp. 1996) provides that a court has discretion to remove a guardian if the guardian failed to obey a court order concerning the performance of the guardian's duties. The guardian testified that he had listed the property with two different brokers and that he had advertised the property in the newspaper, but that no one had bought the property. The trial court found that the guardian had acted to follow the court order. *Ellison*, 914 S.W.2d at 680.

or Probate Code section 761(c)(7)⁸⁸ when it found that the guardian had acted reasonably and prudently.⁸⁹ The appeals court upheld the trial court's award of attorney's fees to the guardian.⁹⁰ Finally, the appeals court upheld the homestead designation on 100 acres of the ward's property.⁹¹

In *Adcock v. Sherling*⁹² the court held that the trial court improperly failed to appoint the ward's son as guardian when the trial court had no evidence before it that the son was not eligible to serve as guardian.⁹³ The ward gave two of her sons a certificate of deposit several years before the commencement of the guardianship proceedings. The sons kept the certificate of deposit, but used it for the benefit of their mother. At the hearing on the application for appointment of guardian, one of the sons testified concerning the existence of the certificate of deposit, the agreement that he and his brother had with his mother concerning the use of the funds, and the actual use of the funds. The son also testified that he owed his mother no money, that he was not a party to a lawsuit that affected his mother, and that he had no claim adverse to her. The trial court found that the son, by holding the certificate of deposit, in effect asserted a claim against his mother's estate and could not serve as guardian because of the perceived conflict of interest with his mother's estate. The trial court appointed the son's niece as guardian of her grandmother's estate. The appeals court held that the evidence did not show that the son asserted a claim against the estate or that any conflict of interest existed.⁹⁴ The court then determined that under Probate Code section 677(a)(2)⁹⁵ the trial court should have appointed the son rather than the granddaughter as guardian.⁹⁶ The court next determined that

88. TEX. PROB. CODE ANN. § 761(c)(7) (Vernon Supp. 1996) provides that the court has discretion to remove a guardian if the guardian "interferes with the ward's progress or participation in the community." *Id.* The trial court found that the guardian did not interfere with the ward's progress, although the guardian attended annual meetings concerning the ward and expressed his opinions at those meetings.

89. *Ellison*, 914 S.W.2d at 683.

90. *Id.*

91. *Id.* at 684-85. The court found that the guardian had established the intent to create a homestead for the ward when the guardian placed a mobile home on the acreage to provide a residence for the ward if the ward had to leave the state school for any reason. *Id.* at 684. The court further stated its belief that the guardian would have breached his duty if he had failed to establish the homestead. *Id.*

92. 923 S.W.2d 74 (Tex. App.—San Antonio 1996, no writ).

93. *Id.* at 79.

94. *Id.* at 77. The court stated as follows: "Surely, if a parent gives a child a portion of the parent's property, trusting that the child will use the property to care for the parent's benefit, and the child holds the money for that purpose, the child is not thereby rendered ineligible to serve as the parent's guardian." *Id.* at 76.

95. TEX. PROB. CODE ANN. § 677(a)(2) (Vernon Supp. 1996) provides that, when two or more eligible persons qualify for appointment as guardian, the ward's next of kin shall serve as guardian if the ward's spouse is not eligible to serve. *Id.*

96. *Adcock*, 923 S.W.2d at 77. The court found that TEX. PROB. CODE ANN. § 677 required the court to appoint the ward's son as her guardian, since he was the next of kin and he was eligible to serve when the ward's spouse was not eligible or willing to serve, and that the court could not appoint the granddaughter since she was not related to the ward in the same degree as the ward's son. *Id.* at 78.

the funds held in the certificate of deposit were a part of the ward's estate since the son held the funds for the ward's benefit.⁹⁷ The court reformed the judgment to appoint the son as the guardian and to authorize the issuance of letters to the son, affirmed the trial court's determination on the ownership of the certificate of deposit and the payment of the attorney ad litem's fees, and reversed the part of the judgment that awarded attorney's fees to the niece and the payment of those fees from the certificate of deposit.⁹⁸

B. ATTORNEY AND GUARDIAN'S FEES

In *Simmons v. Harris County*⁹⁹ the court held that an attorney not appointed by the trial court to represent a proposed ward could not recover attorney's fees from the county.¹⁰⁰ The ward's estate did not have sufficient assets to pay the guardian's attorney for his services. The attorney, whom the guardian employed, made an application for payment of attorney's fees by the county. The trial court denied the application and the attorney appealed. The court considered Probate Code section 247¹⁰¹ and determined that it did not allow payment of attorney's fees as costs in an insolvent guardianship.¹⁰² The court next considered whether any other statute provided authority for allowing the attorney's fees as costs, and determined that no such authority existed.¹⁰³ The court thus determined that the attorney could not recover his fees from the county as costs in the case.¹⁰⁴

In *Henderson v. Viesca*¹⁰⁵ the court held that a person may be compen-

97. *Id.* at 79. The court also held that the trial court had personal jurisdiction over the ward's other son since he filed a waiver and renunciation of his right to be appointed guardian prior to the guardianship hearing. *Id.* The waiver constituted an appearance, giving the trial court jurisdiction over the other son and the ability to adjudicate the two sons' rights in the certificate of deposit. *Id.* The court found that the ownership of the funds held in the certificate of deposit were at issue in the case by the application for appointment of guardian, even though the certificate of deposit was not specifically mentioned in the pleadings. *Id.*

98. *Id.* at 80.

99. 917 S.W.2d 376 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

100. *Id.* at 378.

101. TEX. PROB. CODE ANN. § 247 (Vernon 1980), which has now been replaced by TEX. PROB. CODE ANN. § 669 (Vernon Supp. 1996), provided that the county shall pay for the cost of the proceeding if the estate has insufficient assets to pay for the costs. TEX. PROB. CODE ANN. § 669 (Vernon Supp. 1996) was in effect at the time the trial court made its determination that the county was not responsible for the attorney's fees. TEX. PROB. CODE ANN. § 669 (Vernon Supp. 1996) reads essentially the same as TEX. PROB. CODE ANN. § 247 (Vernon 1980) did.

102. *Simmons*, 917 S.W.2d at 377.

103. *Id.* at 377-78. The court found that TEX. PROB. CODE ANN. § 688 (Vernon Supp. 1996) specifically allows as costs the fees of attorneys appointed under TEX. PROB. CODE ANN. § 646 (Vernon Supp. 1996), which provides for the appointment of an attorney ad litem. *Simmons*, 917 S.W.2d at 378. The attorney requesting the fees in this case was not the attorney ad litem, but was instead the guardian's attorney, engaged by the guardian, not appointed by the court.

104. *Id.*

105. 922 S.W.2d 553 (Tex. App.—San Antonio 1996, writ denied).

sated for services both as a guardian and as attorney for the estate.¹⁰⁶ The ward first had a guardian of her estate appointed in 1981 and a guardian for her person appointed in 1982. In 1988, following litigation, the court appointed the appellee guardian of the estate. The appellee only consented to serve if she could serve as both guardian and attorney for the estate. No one objected, and the court specifically stated, in its order appointing the guardian, that she could serve as attorney for the estate at her usual rate if she obtained the court's approval of her fee. The court also specifically provided that the guardian could receive the statutory guardian's commission. The guardian later sought court approval for the engagement of another attorney for the estate for a specific, limited purpose of representing the estate in litigation involving the construction of a testamentary trust and breach of fiduciary duty by the trustee of the trust. The court approved the engagement, and the second attorney secured a significant trust distribution for the ward, as well as a settlement on the breach of fiduciary duty issue. During the litigation, however, one of the ward's daughters filed a motion requesting the court to remove the guardian and to disallow payment of any attorney's fees to the guardian. The court determined that the daughter lacked standing to request the disallowance of attorney's fees since she and the guardian were adverse parties in the trust litigation. The guardian resigned after the settlement of the trust litigation, which rendered moot the daughter's application for removal. The guardian filed a final accounting, along with applications for her guardianship fee, for additional compensation, and for attorney's fees and expenses. The ward's attorney ad litem objected to the final account and filed an amended bill of review objecting to the court's approval of the guardian's earlier annual accounts and applications for attorney and guardian's fees. The court denied the amended bill of review, approved most of the annual account, and authorized payment of the guardian's fee, the additional compensation, and the attorney's fees. The appeals court found no case law that directly authorized the payment of both the guardian's commission and attorney's fees to the same individual,¹⁰⁷ but stated that public policy favors double compensation to avoid duplication of effort and costs.¹⁰⁸ The court held that the trial court properly awarded both attorney's fees and guardian's compensation to the guardian.¹⁰⁹ The court also affirmed the trial court's award of guardianship commissions on the increased distributions from the trust

106. *Id.* at 558.

107. *Id.* at 557-58. The court, however, found two cases that authorized payment to an individual for services as attorney and executor. *Id.* (citing *Burton v. Bean*, 549 S.W.2d 48, 51-52 (Tex. Civ. App.—El Paso 1977, no writ), and *Neblett v. Butler*, 162 S.W.2d 458, 461-62 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.)).

108. *Henderson*, 922 S.W.2d at 558. The court stated that the probate court would consider each application more carefully to ensure that no duplication of payment would occur, which would benefit the estate. *Id.*

109. *Id.*

that resulted from the litigation.¹¹⁰ The court upheld the trial court's order reimbursing the guardian for attorney's fees she incurred in defending the removal action,¹¹¹ but also held that the guardian should be reimbursed for fees she incurred in defending the final account.¹¹²

In *Dalworth Trucking Co. v. Bulen*¹¹³ the court held that the fee awarded to an attorney ad litem appointed to represent the interests of a minor child was excessive and reduced the fee.¹¹⁴ The underlying wrongful death litigation concerned the death of the child's father in a truck accident. The court appointed an attorney ad litem to represent the interests of the decedent's minor child in the litigation. The ad litem involved himself in the litigation, taking an active role in depositions, mediation, and the trial. The ad litem also helped establish a guardianship for the child. The ad litem testified that, due to the complex issues and amount of time involved in representing the interests of the child, he lost other business. The trial court awarded the ad litem \$100,000 for his efforts. The appeals court found that the ad litem could only account for time that would result in a fee of about \$30,000, and accordingly reduced the judgment for the ad litem's fee to \$40,000.¹¹⁵

VI. TRUSTS

A. TRUSTS AND TRUSTEES

In *Huie v. DeShazo*¹¹⁶ the court held that an attorney representing a trustee in his fiduciary capacity represents only the trustee, not any beneficiary of the trust.¹¹⁷ The relator served as executor of his wife's will and trustee of three testamentary trusts that she established for the benefit of her three daughters. A conflict arose between the relator and one of the daughters, who sued her father for breach of fiduciary duty. The daughter took the deposition of the attorney who had represented her father in his fiduciary capacities since her mother's death. Until the time of the lawsuit, the attorney had received his compensation from estate and trust funds. At the deposition the attorney claimed the attorney-client and attorney-work-product privileges and declined to answer any questions that

110. *Id.* at 560. The court found that the evidence of the accountings supported the trial court's determination that the trust distributions were income, not principal, so the guardian could receive compensation based upon the distributions. *Id.*

111. *Id.* at 561.

112. *Id.* at 562. The court remanded the case to the trial court for a determination of the amount of reimbursement the guardian should receive for defending the final account. *Id.* at 566.

113. 924 S.W.2d 728 (Tex. App.—Texarkana 1996, no writ).

114. *Id.* at 739.

115. *Id.* The ad litem apparently urged that part of his fee was a contingent fee, but the court found that he could recover a contingent fee only if the order appointing him as ad litem specifically provided that his fees were contingent upon success for the child. *Id.* at 738. The court stated that if the ad litem received any fees for assisting the plaintiffs, he should receive compensation from the contingent fees of the plaintiffs' attorneys, not from the defendants. *Id.* at 738-39.

116. 922 S.W.2d 920 (Tex. 1996).

117. *Id.* at 921.

concerned the business of the trust. The daughter attempted to compel the attorney's responses, but the attorney requested a protective order. The trial court ordered the attorney to respond to any questions concerning matters that occurred before the date of the lawsuit, finding that the attorney-client privilege did not apply to communications between the trustee and the attorney relating to those matters.¹¹⁸ The trial court also found that the trustee and attorney could not claim the attorney-work-product privilege for matters occurring prior to the time the daughter filed suit. The trustee moved for leave to file writ of mandamus, which the appeals court initially granted, then vacated, stating that it granted the order improvidently. The trustee then sought relief from the supreme court. The daughter argued that because the trustee owed the beneficiary the duty of full disclosure, he could not hide behind the attorney-client privilege concerning fiduciary matters. The court agreed that the trustee owed the duty to disclose any material matters that affected the beneficiary's rights, but found that the communication between the trustee and the attorney was subject to the attorney-client privilege.¹¹⁹ The court held that the attorney-client privilege applies to communications between the trustee and the attorney under Rule 503¹²⁰ even though the trustee has the duty to disclose material matters to the beneficiary.¹²¹ The court further discounted the beneficiary's argument that the attorney represented her and held that the attorney represented the trustee in his fiduciary capacity, not the beneficiary.¹²² The court also found that the trustee and the attorney could claim the attorney-work-product privilege for all materials prepared after the time they anticipated litigation.¹²³

In *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*¹²⁴ the court determined that the trustee owned certain stock certificates issued in the name of the trust, rather than the trustee, since the trustee held legal title to the stock certificates.¹²⁵ The appellant was an employee of a partnership, one of the partners of which was a corporation in which she also owned stock. The appellant and the partnership entered into an employment agreement, which provided for the appellant's employment by the partnership for ten years. The employment agreement included a termination clause that provided that her employment could be terminated by unanimous consent of all the partners of the partnership if the partner-

118. The trial court determined that the attorney-client privilege only extended to communications between the trustee and the attorney after the lawsuit arose, when the trustee sought advice from the attorney concerning his defense of the lawsuit and the trustee individually paid for the advice rather than paying for the advice from trust funds. See *id.* at 922.

119. *Id.* at 923-24. The court noted that a trustee might choose not to seek legal advice if he thought that his communication with the attorney would not fall within the attorney-client privilege, which might harm the beneficiaries. *Id.* at 924.

120. TEX. R. CIV. EVID. 503.

121. *Huie*, 922 S.W.2d at 925.

122. *Id.* at 925-26.

123. *Id.* at 927.

124. 907 S.W.2d 586 (Tex. App.—Corpus Christi 1995, no writ).

125. *Id.* at 590.

ship interests remained in the hands of the shareholders of the two corporations that formed the partnership, or the "respective heirs and personal representatives, lineal descendants, . . . and any combination of the foregoing"¹²⁶ of any of the shareholders. The employee transferred her stock in the corporation to irrevocable trusts the year after she entered the employment agreement. The employee's daughter served as trustee of the trusts, and the daughter and the employee's grandchildren were the beneficiaries of the trusts. The corporation issued the stock certificates in the name of the trusts rather than in the daughter's name, as trustee. A dispute later arose between the employee, a shareholder in the corporation that was the other partner to the partnership, and the remaining shareholder in the corporation in which the employee had once held stock. As a result of the dispute, the partnership terminated the employee's employment. The majority shareholder in the corporation in which the employee had previously owned stock then removed the employee as an officer and director of the corporation. The employee brought suit for wrongful termination. The trial court granted summary judgment for the defendants and the employee appealed. The employee argued on appeal that the other parties to the employment agreement could not enforce the termination provision because of the transfer of the employee's stock to the trusts. The appeals court had to consider the terms of the employment agreement, as well as the trust agreements, to determine whether the transfer made the termination provision of the employment agreement inapplicable. The court found that the trustee held legal title to the stock.¹²⁷ The court then considered the issue of whether the daughter and grandchildren, who held equitable title to the stock as beneficiaries of the trust, were the employee's heirs and lineal descendants.¹²⁸ The employee urged that her heirs and lineal descendants could not be determined until her death, but the court noted that the terms carry the connotation of a living person's issue.¹²⁹ The court examined the entire employment agreement to determine the meaning of the terms, found that the employment agreement separately covers termination at the death of the employee, and determined that the best method to give full effect to the agreement was to find that the employee's daughter and grandchildren were her lineal descendants for purposes of the agreement.¹³⁰ The court thus found that the termination provisions of the employment agreement applied and that the termination of the employee was valid.¹³¹

126. *Id.* at 589.

127. *Id.* at 590.

128. *Id.* at 591-92.

129. *Id.* at 591 (citing *Parrish v. Mills*, 101 Tex. 276, 284, 106 S.W. 882, 886 (1908), and *Reilly v. Huff*, 335 S.W.2d 275, 279 (Tex. Civ. App.—San Antonio 1960, no writ)).

130. *Id.* at 591-92.

131. *Id.* at 592. The court held that the surviving shareholder of the corporation did not owe the employee a fiduciary duty under an "implied covenant of good faith and fair dealing" since the supreme court does not recognize that covenant. *Id.* (citing *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 285 n.1 (Tex. 1993), and *English v. Fischer*, 660

In *Cleaver v. George Staton Co.*¹³² the court held that the husband of a beneficiary of a trust did not have standing to sue the trustee for causes of action related to alleged breaches of fiduciary duty.¹³³ The wife's father created a testamentary trust for her benefit. The husband and wife married several years after the death of the wife's father. During the marriage the trustee made no distributions of income to the wife, although the terms of the trust provided for mandatory income distributions. The husband and wife separated and, while the divorce was pending, the husband attempted to sue the trustee for breach of duty. Initially the husband was the sole plaintiff in the trust action, but later he amended his petition to include his wife as an "involuntary plaintiff." The trial court dismissed the husband's suit for lack of standing. The appeals court first found that any income distributions from the trust would be the wife's separate property,¹³⁴ but that even if the distributions were community property, that would have been the wife's sole management community property.¹³⁵ The court found that the trial court never gained jurisdiction over the wife since no service of process occurred, she never filed pleadings in connection with the trust action, and her attorney only appeared at a hearing on the consolidation of the trust action with the divorce action.¹³⁶ The court also held that the fact that the husband attempted to join the wife as an "involuntary plaintiff" did not give him standing to pursue the trust action.¹³⁷

In *Colvin v. Alta Mesa Resources, Inc.*¹³⁸ the court held that the owner/beneficiary of an individual retirement account (IRA) could assign assets of the IRA without authorization of the trustee of the account.¹³⁹ The owner of the IRA acquired a 1% interest in a mineral lease, which he held individually, then later acquired an additional 2% interest, which he held in his IRA. A bank served as custodian of the IRA. The owner of the IRA later assigned all of the interests to a third party, which then transferred those interests to another third party. The bank custodian

S.W.2d 521, 522 (Tex. 1983)). Finally, the court held that the surviving shareholder did not owe the employee any fiduciary duty based upon their friendship. *Id.*

132. 908 S.W.2d 468 (Tex. App.—Tyler 1995, writ denied).

133. *Id.* at 471.

134. *Id.* at 470 (citing *In re Marriage of Long*, 542 S.W.2d 712, 717-18 (Tex. Civ. App.—Texarkana 1976, no writ)).

135. *Id.* (citing TEX. FAM. CODE ANN. § 4.22(a)(2) (Vernon Supp. 1996)).

136. *Id.*

137. *Id.* at 471. The court found that only the wife had standing to pursue a cause of action concerning the trustee's failure to make income distributions since the distributions, if made, would have been the wife's separate property. *Id.* at 470-71. The court also found that even if any trust distributions would have been community property, only the wife would have had standing during the marriage to pursue the cause of action since the distributions would have been her sole management community property. *Id.* at 471. Further, the court noted that the husband did not allege that his wife attempted to defraud the community estate by failing to pursue any claims against the trustee for failure to distribute the funds. *Id.* The court found that the husband could not wrest the wife's management of her special community merely by naming her as an "involuntary plaintiff." *Id.*

138. 920 S.W.2d 688 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

139. *Id.* at 691.

was not a party to the assignment from the IRA. The document evidencing the assignment recited consideration and the assignee filed the document with the county clerk of the county in which the lease was located. Following the assignment the operating company continued to pay the IRA owner his 1% individually and the IRA the 2%. The second assignee notified the operating company of its claim. The operating company then interpleaded future payments and requested that the court determine to whom the payments should be made. The second assignee filed a motion for summary judgment, setting forth the chain of title, and claiming that it owned all of the 3% interest. The trial court granted the second assignee's motion for summary judgment and found that the second assignee owned the disputed 2% interest that had previously been owned in the IRA. The appeals court found that an IRA is the same as a savings account since the beneficiary can control the investment and distribution of the IRA.¹⁴⁰ The owner contended that he could not transfer title to the mineral interests since he was merely a beneficiary of the trust. He and the bank both contended that only the bank, as trustee, could assign the mineral interests. The appeals court found that the bank served merely as an administrator over the IRA assets, maintaining records of account transactions and that the owner could transfer IRA assets without any action of the bank.¹⁴¹

In *Starcrest Trust v. Berry*¹⁴² the court held that the trial court did not err when it found that the settlor/trustee of a revocable trust revoked the trust when he executed a deed of trust on real property owned by the trust to secure a personal loan.¹⁴³ The appellant¹⁴⁴ sought to enjoin a non-judicial foreclosure on real property held in trust, and also requested a declaratory judgment that the lien created by the deed of trust was invalid. The trial court temporarily enjoined the foreclosure. The appellee then counterclaimed for repayment of the funds he allegedly loaned and requested a judicial foreclosure. The evidence at trial showed that the appellee loaned the funds to the trustee of the trust for the trustee's personal benefit. The trustee had a note and deed of trust prepared and executed the documents in the name of trust. The trial court found that the settlor/trustee revoked the trust by executing the deed of trust. The trial court entered judgment against the appellant for the amount of the loan plus attorney's fees and ordered a judicial foreclosure. The trustee appealed. The appeals court found that the settlor/trustee executed the

140. *Id.* at 690 (citing *In re Damas*, 136 B.R. 11, 18 (Bankr. D.N.H. 1991)).

141. *Id.* at 691. The court cited *Lee v. Gutierrez*, 876 S.W.2d 382, 386 (Tex. App.—Austin 1994, writ denied), for the proposition that the bank was like a safe deposit box and served merely as a repository and that the assets held in the IRA were like the contents of the safe deposit box. *Colvin*, 920 S.W.2d at 691. Thus, the court reasoned, the owner could determine what assets were held in the IRA just as he could have determined what assets to place in a safe deposit box. *Id.*

142. 926 S.W.2d 343 (Tex. App.—Austin 1996, no writ).

143. *Id.* at 353.

144. The trustee of the trust filed for the injunction in the name of the trust rather than in the name of the trustee.

documents in his capacity as settlor rather than as trustee.¹⁴⁵ The court found that the deed of trust showed evidence of the settlor/trustee's intent to revoke the trust,¹⁴⁶ and that the trial court did not err when it found that the settlor/trustee revoked the trust.¹⁴⁷ The court also found that the trial court had jurisdiction over the counterclaim even though the minor beneficiaries did not receive service or have ad litem representation.¹⁴⁸ Finally, the court determined that the trial court did not err by entering judgment against the trust rather than the trustee.¹⁴⁹

B. POWER OF APPOINTMENT

In *Nowlin v. Frost National Bank*¹⁵⁰ the court held that a trust beneficiary validly exercised a testamentary special power of appointment in favor of two charities.¹⁵¹ The beneficiary's parents created two irrevocable trusts, one for the benefit of each of their sons, in 1981. The trust agreements provided that each trust would terminate on the later of two years following the death of the second of the settlors to die or the date the beneficiary attained the age of thirty-five years. The trust agreements gave the beneficiaries a testamentary special power of appointment to a class that included relatives of the beneficiary and charities. The provision granting the special power of appointment stated that the exercise of the power would be invalid if it attempted to force the trustee to distribute trust property to the appointee at any time prior to two years after the death of the second of the settlors to die. The beneficiary's father died in 1985 and the beneficiary died in 1992, survived by his mother and brother. The beneficiary executed a will in which he purported to exercise the special power of appointment in favor of two charities. The exercise specifically referred to the special power of appointment in the trust agreement. The beneficiary's brother contested the exercise of the special power of appointment, alleging that it was invalid. The brother also alleged that the trust provision creating the power of appointment was ambiguous. The trial court found that the beneficiary validly exercised

145. *Starcrest*, 926 S.W.2d at 353. The court based its determination on TEX. PROP. CODE ANN. § 113.052(a)(1) (Vernon 1984), which provides that a trustee may not lend trust funds to himself.

146. *Starcrest*, 926 S.W.2d at 353 (citing GEORGE G. BOGART, *THE LAW OF TRUSTS AND TRUSTEES* § 1001 (rev. 2d ed. 1983), which states that a settlor may revoke a trust by conveying trust property to a third person).

147. *Id.*

148. *Id.* at 355-56. The court found that the settlor/trustee adequately represented his children's interests at trial and that he did not have a conflict of interest with his minor children. *Id.* at 355.

149. *Id.* at 356. The trustee argued that the appellee should not have counterclaimed against the trust since it was not a legal entity, but the trustee did not raise this issue at trial. The court found the trustee's argument raised a defect in the counterclaim pleading, which the appeals court could not promote to a position of fundamental error. *Id.* Further, the appellee merely named the same party in his counterclaim as was named in the original suit. Because the settlor/trustee actively participated in the trial, the court found that he had adequate notice. *Id.*

150. 908 S.W.2d 283 (Tex. App.—Houston [1st Dist.] 1995, no writ).

151. *Id.* at 289.

his power of appointment and his brother appealed. The appeals court found no ambiguity in the language creating the special power of appointment.¹⁵² The court found that the language of the beneficiary's will did not invalidate the power of appointment.¹⁵³ The court then found that probate law did not require the immediate distribution of trust estate following the beneficiary's death, but instead gave the charities a vested interest in the trust property subject to postponed possession.¹⁵⁴ The court found that the trust agreement controlled the distribution of the appointed property.¹⁵⁵ The court held that the beneficiary validly executed the special power of appointment and that the beneficiary did not attempt to force the trustee to distribute trust property prior to the termination of the trust estate.¹⁵⁶

C. RESULTING TRUSTS

In *Richardson v. Laney*¹⁵⁷ the court found that a resulting trust arose in favor of the father when he transferred his home to two of his children without consideration and without the intent to make a gift to the children.¹⁵⁸ After he began treatments for cancer the father deeded his home and real estate to his daughter and one of his sons. He continued to live in the home until his death. The son did not record the deed until several days following his father's death. Following the father's death, a will contest and other litigation arose concerning the father's estate. The donee son and daughter contended that their father meant to give them the home and real estate when he executed the deed. Some evidence showed, however, that the father transferred the home in order to acquire or maintain government entitlements. Further, the donee son stated in pleadings he filed in the case that the real property was part of his father's estate at the time of his death. The jury found that the father did not intend to give the home and real estate to the donees. The appeals court held that sufficient evidence existed to uphold the jury's finding.¹⁵⁹ The appeals court then found that it could affirm the trial court's judgment that the home and real estate were part of the father's estate by imposing a resulting trust.¹⁶⁰ The court found that the imposition of the equitable remedy of resulting trust was appropriate when evidence existed that the father did not receive any consideration for the transfer and

152. *Id.* at 286. The court stated that any ambiguity was in the beneficiary's will, not in the trust provision. *Id.*

153. *Id.* at 288. The exercise of the power of appointment in the will did not require the trustee to distribute the appointed property prior to two years after the death of the beneficiary's mother. *See id.* at 287-88.

154. *Id.* at 288.

155. *Id.* at 289.

156. *Id.*

157. 911 S.W.2d 489 (Tex. App.—Texarkana 1995, no writ). For a discussion of the other issue in this case see *supra* notes 1-3 and accompanying text.

158. *Id.* at 493.

159. *Id.*

160. *Id.*

that he did not intend to make a gift.¹⁶¹

In *Leighton v. Leighton*¹⁶² the court found that the fact that a husband and wife executed a deed of trust on the husband's separate property did not create a resulting trust in favor of the wife.¹⁶³ The husband acquired, as the result of a distribution from a trust created by his parents, several hundred acres. Shortly after the husband acquired the property he and his wife married. The property was the husband's separate property. The husband and wife later decided to homestead the property by building their home there. In order to pay for the residence, the husband and wife executed a promissory note payable to the builder, who secured payment through a mechanic's lien on the property. The husband and wife later borrowed the funds for paying the builder from a bank, executed a promissory note payable to the bank, and executed a deed of trust securing payment of the note. The couple separated some ten years later. The wife continued to make payments on the promissory note and she also paid taxes and insurance on the property. The wife contended at the divorce trial that her husband gave her an interest in half of the property when they decided to build their home. The husband denied making a gift of any part of the property and stated that the wife executed loan documents and the deed of trust only at the bank's insistence. No evidence of a deed existed. The trial court determined that, by executing the deed of trust, the couple conveyed the property to the trustee under the deed of trust. The trial court found that the deed of trust created a resulting trust in the wife's favor and that the ranch was community property. The trial court entered a judgment giving the husband and wife each an undivided one-half interest in the property. The husband appealed. The appeals court found that no authority existed for the imposition of a resulting trust in the wife's favor merely because the couple executed a deed of trust.¹⁶⁴ The court held that a resulting trust did not arise when the husband and wife executed a mortgage loan and deed of trust for improvements to the husband's separate property.¹⁶⁵

161. *Id.* The court also found that sufficient evidence existed that the father did not intend to make a gift of a certificate of deposit to the son and daughter. *Id.* at 494. Evidence showed that the son withdrew part of the certificate to pay his father's funeral expenses and that the father received all of the interest on the certificate of deposit until his death. The certificate of deposit was held in the names of the son and daughter as joint tenants with rights of survivorship. The certificate was purchased with funds from an earlier certificate of deposit that initially was held in the father's name as trustee for the son and daughter, but which the son later changed to remove the father as trustee and to place just into his and his sister's names. The court found that the jury could have determined that the father did not intend to make a gift based upon the evidence presented. *Id.*

162. 921 S.W.2d 365 (Tex. App.—Houston [1st Dist.] 1996, no writ).

163. *Id.* at 368.

164. *Id.* The court noted that the appropriate remedy was the right to community reimbursement. *Id.* (citing *Girard v. Girard*, 521 S.W.2d 714, 717 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ)). The court, citing *Bybee v. Bybee*, 644 S.W.2d 218, 221 (Tex. App.—Fort Worth 1982, no writ), stated that a resulting trust did not arise merely by using community funds for payments on separate property. *Leighton*, 921 S.W.2d at 368.

165. *Id.*